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My Pillow, Inc.

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

MY PILLOW, INC., a Minnesota
Corporation,

Plaintiff,

v.

SHOPIFY (USA) INC., a Delaware
Corporation, and DOES 1-10, individually
and d/b/a www.MyPillowStore.com,
inclusive,

Defendants.

CASE NO.:

COMPLAINT FOR:

(1) TRADEMARK INFRINGEMENT
UNDER 15 U.S.C. §1125(a);

(2) FALSE DESIGNATION OF
ORIGIN, PASSING OFF & UNFAIR
COMPETITION UNDER 15 U.S.C. §
1125(a) and §1117(a);

(3) COMMON LAW TRADEMARK
INFRINGEMENT

(4) COMMON LAW UNFAIR
COMPETITION

JURY TRIAL DEMANDED

1 Plaintiff My Pillow, Inc. (hereinafter referred to as “My Pillow” or “Plaintiff”)
 2 for the causes of action against Defendant Shopify (USA) Inc. (“Shopify”), DOES 1
 3 through 10 individually and d/b/a www.MyPillowStore.com, (hereinafter referred to as
 4 “Defendant(s)”), inclusive, and each of them, alleges as follows:

5 6 NATURE OF THE ACTION

7 1. This is an action for trademark infringement, trademark dilution, unlawful
 8 and unfair business practices, and related causes of action under federal and common
 9 law.

10 2. By this action, My Pillow seeks to remedy Defendants’ repeated,
 11 persistent, and intentional infringement of My Pillow’s intellectual property rights
 12 related to My Pillow’s famous “MYPILLOW” Marks¹ and the likeness of its CEO and
 13 founder, Mike Lindell.

14 15 PARTIES

16 3. Plaintiff My Pillow (“Plaintiff” or “My Pillow”) is a Minnesota
 17 Corporation, having its principal place of business at 343 East 82nd Street, Suite 100,
 18 Chaska, Minnesota 55318.

19 4. Defendant Shopify (USA), Inc. (“Shopify”) is a Delaware corporation with
 20 its agent for service of process located at: 818 W Seventh St., Suite 930, Los Angeles,
 21 California 90017.

22 5. The true names, identities and capacities, whether individual, associate,
 23 corporate or otherwise, of Defendants DOES 1 through 10, individually and d/b/a
 24 www.mypillowstore.com inclusive, and each of them (the “DOE Defendants”), are
 25 _____

26 ¹ The term “My Pillow Marks” refers to Plaintiff’s MYPILLOW word and design trademarks and
 27 “GUARANTEED THE MOST COMFORTABLE PILLOW YOU’LL EVER OWN” trademark
 28 described herein.

1 unknown to Plaintiff at this time, who therefore sues the DOE Defendants by such
2 fictitious names. When the true names and capacities or participation of the DOE
3 Defendants are ascertained, Plaintiff will amend this complaint to assert the true names,
4 identities and capacities. Plaintiff is informed and believes and thereon alleges that each
5 of the DOE Defendants sued herein is responsible for the wrongful acts alleged herein,
6 and is therefore liable to Plaintiff in some manner for the events and happenings alleged
7 in this complaint. Plaintiff is informed and believes and thereon alleges that at all times
8 herein mentioned, the DOE Defendants were and are doing business and/or residing in
9 this District.

10 11 JURISDICTION AND VENUE

12 6. Subject matter jurisdiction over the federal Lanham Act claims in this
13 action is conferred upon this Court pursuant to 15 U.S.C. § 1121, and 28 U.S.C. §§1331,
14 1338 and 1367.

15 7. This Court has jurisdiction over Plaintiff's related California state law
16 claims under 28 U.S.C. §§ 1338 and 1367. Jurisdiction is further based upon 28 U.S.C.
17 § 1332, the parties being of different states and the amount in controversy being in
18 excess of the jurisdictional minimum, \$75,000, excluding interest and costs.

19 8. Upon information and belief, this Court has personal jurisdiction over
20 Defendant in that Defendant has extensive contacts with and regularly conducts,
21 transacts and/or solicits business in the State of California and this judicial District.

22 9. Upon information and belief, venue is proper in this District pursuant to 28
23 U.S.C. §§1391(b) and (c) because Defendants have extensive contacts with, and conduct
24 business in, the State of California and this judicial District.

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FACTUAL ALLEGATIONS

Plaintiff My Pillow's Well-Known "MYPILLOW" Marks

10. Plaintiff My Pillow is a leading producer of bed pillows that contain its proprietary, interlocking fill that will not "go flat" like other pillows. My Pillow manufactures its products in the United States at its headquarters in Minnesota.

11. My Pillow expends substantial sums of money to produce and air national television, radio, print, and internet advertising, to promote and sell its products. As a result of this advertising, Plaintiff has sold over 30 million pillows and the MYPILLOW brand, and has, along with its founder and CEO Mike Lindell, generated substantial customer goodwill to become one of America's the most widely-recognized brands.

12. In or about October 2004, My Pillow began marketing and selling its pillows with its proprietary, interlocking fill under the brand name, "MYPILLOW." My Pillow has continued to produce, market and sell its "MYPILLOW" brand pillow products and has sold millions of units of its "MYPILLOW" brand pillow products, with total sales exceeding several hundred million dollars.

A. Plaintiff's "MYPILLOW" Trademarks

13. Since October 2004, My Pillow and its predecessor company has continuously used the MYPILLOW trademarks in interstate commerce in connection with the advertising, distribution, marketing and sale of its pillow products, including through its website www.mypillow.com. My Pillow is the owner of all right, title and interest in the common law trademark MYPILLOW.

14. While My Pillow has gained significant common law trademark and other rights in the MYPILLOW Marks and the My Pillow Products through its use, advertising and promotion, Plaintiff has also protected its valuable rights by owning several federal trademark registrations for MYPILLOW.

15. Night Moves Minnesota, LLC ("Night Moves"), a Minnesota limited liability company, filed an intent to use trademark application on July 1, 2004 for the

1 word mark “MYPILLOW” for pillows in International Class 020. On January 7, 2008,
2 Night Moves filed an allegation of use. In the allegation of use, Night Moves claimed a
3 date of first use anywhere of October 2004 and a date of use in interstate commerce of
4 October 2004. The trademark registered on April 8, 2008 with US Registration No.
5 3,410,314 (“My Pillow Trademark Registration”) for the trademark “MYPILLOW” in
6 connection with pillows. A copy of the My Pillow Trademark Registration is attached
7 as Exhibit A and is incorporated by reference.

8 16. On August 14, 2009, Night Moves assigned its entire interest in and to the
9 trademark “MYPILLOW,” the My Pillow Trademark Registration, along with all
10 goodwill associated therewith, to My Pillow.

11 17. My Pillow has been continuously using the MYPILLOW mark in
12 commerce since August 14, 2009 and Night Moves had continuously used the
13 MYPILLOW mark in commerce since 2004.

14 18. On April 4, 2014, a declaration of incontestability under §15 of the
15 Trademark Act, 15 U.S.C. §1065 was accepted by the United States Patent and
16 Trademark Office. A true and correct copy is attached hereto as Exhibit B.

17 19. In October 2004, Plaintiff developed the design logo
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23 and continues to use the design logo as a common law trademark in California for
24 pillows, bedding and retail store services. This common law trademark is the subject of
25 an application for federal trademark registration having application serial number
26 87/613,136 (Exhibit C).

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B. Plaintiff's "GUARANTEED THE MOST COMFORTABLE PILLOW YOU'LL EVER OWN" Trademark

20. Plaintiff also holds a registered trademark for "GUARANTEED THE MOST COMFORTABLE PILLOW YOU'LL EVER OWN" in connection with pillows in International Class 020. The trademark registered on October 9, 2012 with US Registration No. 4,221,351. A copy of the My Pillow Trademark Registration is attached as Exhibit D and is incorporated by reference.

21. Plaintiff first used the GUARANTEED THE MOST COMFORTABLE PILLOW YOU'LL EVER OWN mark in commerce on July 11, 2005 and has continuously used the mark in interstate commerce since then.

22. Plaintiff's MYPILLOW marks and common law trademark described above and the "GUARANTEED THE MOST COMFORTABLE PILLOW YOU'LL EVER OWN" marks are collectively referred to herein as the "My Pillow Marks".

C. Plaintiff Has Spent Millions of Dollars on Advertising And Marketing of Products Under the My Pillow Marks.

23. On average, My Pillow spends over a \$4,000,000 a month advertising its products sold under the My Pillow Marks. As a result of this substantial spending, My Pillow has grown the goodwill and recognition of its My Pillow Marks.

24. My Pillow has gone through great effort and expense in promoting its My Pillow Marks and developing consumer recognition and goodwill. My Pillow has spent in multiple tens of millions of dollars in national advertising for MY PILLOW brand pillows.

25. As a result of the significant advertising, promotion and sale of its MY PILLOW brand pillows, My Pillow has developed significant goodwill and customer recognition in the MY PILLOW Mark, making it famous. The MY PILLOW brand pillows, the company, and its founder Mike Lindell have been the subject of many unsolicited stories in various national publications, the Internet and on television.

1 26. The public views the MY PILLOW Mark as an indication of the high
2 quality of My Pillow's pillow products.

3
4 **Defendants' Unauthorized Use of Plaintiff's My Pillow Marks**

5 27. Defendant Shopify is a web-based ecommerce provider. According to
6 Shopify: "Shopify is a complete ecommerce solution that allows you to set up an online
7 store to sell your goods. It lets you organize your products, customize your storefront,
8 accept credit card payments, track and respond to orders — all with a few clicks of the
9 mouse." See <https://www.shopify.com/faq/what-does-shopify-do> (Last accessed: April
10 2, 2018).

11 28. Shopify charges users a monthly fee plus fees for processing payments,
12 including a percentage based fee for all credit card sales. See
13 <https://www.shopify.com/pricing> (Last accessed: April 2, 2018).

14 29. On or about March 16, 2018, DOES 1-10 privately registered the domain
15 name www.mypillowstore.com through Domains By Proxy, LLC. See Exhibit E.

16 30. Shortly thereafter, DOES 1-10 used Shopify's service to set up an
17 ecommerce site that purports to sell "official" My Pillow brand pillow products. True
18 and correct copies of Defendants' website is attached hereto as Exhibit E.

19 31. Defendants, without the consent or authorization of My Pillow, began
20 advertising and promoting purported MYPILLOW brand pillows using the My Pillow
21 Marks, as well as the image and likeness of My Pillow's founder and CEO, Mike
22 Lindell.

23 32. Defendants have engaged in a number of willful and intentional activities
24 that infringe Plaintiff's My Pillow Marks, constitute false advertising and unfair
25 competition, and intentionally attempt to mislead consumers into purchasing products
26 from the www.mypillowstore.com site.

27 33. For instance, Defendants purport to advertise and sell "official" My Pillow
28 brand products on the website, www.mypillowstore.com, utilizing Defendant's Shopify

1 web hosting and sales platform, and using the My Pillow Marks in an effort to claim an
2 affiliation with Plaintiff and trade off of Plaintiff's goodwill and brand recognition. *See*
3 Exhibit F.

4 34. On information and belief, DOES 1-10 do not actually have My Pillow
5 products to sell and set up the www.mypillowstore.com as a means to steal credit card
6 and other personal information from unwitting consumers, causing further damage to
7 Plaintiff's reputation and consumer goodwill.

8
9 **My Pillow Contacted Shopify To Remove the Infringing Content and Site**

10 35. On or about March 26, 2018, My Pillow sent correspondence to Defendant
11 Shopify through its "Trademark Notice And Infringement Policy" procedures, notifying
12 Shopify that a user of its services created a website, www.mypillowstore.com, and is
13 using a variety of content that infringes My Pillow's valuable intellectual property
14 rights. Specifically, Plaintiff advised Shopify that My Pillow is the owner of all right,
15 title and interest in the My Pillow Marks and the MYPILLOW brand pillows.

16 36. That same day, Jason from "Shopify Legal Operations" responded: "This
17 email is to inform you that we have passed along the Notice of Trademark Infringement
18 to our Merchant consistent with our procedures relating to assertions of intellectual
19 property infringement."

20 37. In response on March 26, 2018, My Pillow emailed Jason from Shopify
21 Legal Operations and again advised Shopify of Defendants' actions described above and
22 demanded that Shopify immediately cease and desist from using the MY PILLOW
23 trademarks and any confusingly similar marks, including, but not limited to, "MY
24 PILLOW". A true and correct copy of the March 26, 2018 correspondence is attached
25 hereto as Exhibit G.

26 38. On March 27, 2018, My Pillow emailed Shopify again, demanding that
27 Shopify remove the www.mypillowstore.com the My Pillow Marks from offending
28 website. Shortly thereafter, Shopify removed the infringing content, however, it re-

1 appeared on March 29, 2018.

2 39. Plaintiff contacted Shopify again, and the My Pillow Marks were removed
3 later that day on March 29, 2018.

4 40. However, Defendants resumed using the My Pillow Marks on March 30,
5 2018. Plaintiff again contacted Shopify and requested that the infringing content be
6 removed. Plaintiff also sought information as to why the site was brought back online
7 and how Shopify would ensure that this does not occur again. Finally, Plaintiff sought
8 assurances that Shopify would not continue to allow content that infringes upon
9 Plaintiff's intellectual property rights. A true and correct copy of the March 30, 2018
10 correspondence is attached hereto as Exhibit H.

11 41. On April 2, 2018, over 40 hours after it reappeared, Shopify finally again
12 removed the infringing content. Plaintiff again requested information as to why Shopify
13 allowed the infringing content to appear for a third time and assurances that it would not
14 happen again. To date, Shopify has not responded to these requests.

15 42. Shopify clearly will not stop its unlawful conduct and will not terminate
16 DOES 1-10's user account for www.mypillowstore.com unless enjoined by the Court.

17 43. Shopify has been aware of Plaintiff's My Pillow Marks and by not
18 permanently deleting the user accounts or the www.mypillowstore.com site, Shopify
19 has aided and abetted the violations of Plaintiff's MY PILLOW intellectual property
20 rights. Based on Shopify's pricing policy, Shopify, on information and belief, earns
21 money from each sale based on the infringing www.mypillowstore.com site.

22 44. Defendants' aforementioned actions are willful and reflect the intent to
23 confuse, mislead and deceive customers and to profit from the goodwill associated with
24 Plaintiff's My Pillow Marks.

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FIRST CAUSE OF ACTION

(Trademark Infringement)

(15 U.S.C. §1125(a) against all Defendants)

45. Plaintiff repeats and realleges the each and every allegation set forth in the preceding paragraphs as if fully set forth herein.

46. The actions of Defendants described above and specifically, without limitation, their unauthorized use of the My Pillow Marks, and confusingly similar variations thereof, in commerce to advertise, promote, market, and sell pillow products throughout the United States, including California, constitute trademark infringement in violation of 15 U.S.C. §1125(a).

47. Defendants were, at the time they engaged in its actions as alleged herein, actually aware that Plaintiff is the owner of the My Pillow Marks.

48. Defendants did not seek, and failed to obtain, consent or authorization from Plaintiff, as the owner of the My Pillow Marks, to use the My Pillow Marks in connection with the advertising, marketing, promotion, offering for sale, and/or sale of its pillow products.

49. Defendants knowingly and intentionally used the My Pillow Marks in commerce in connection with the advertising, marketing, promotion, offering for sale, and/or sale of Defendant's pillow products.

50. Defendants' actions have been deliberate and committed with knowledge of Plaintiff's rights and goodwill in the My Pillow Marks, as well as with bad faith and the intent to cause confusion, mistake and deception.

51. Defendants' continued, knowing and intentional use of Plaintiff's My Pillow Marks, without Plaintiff's consent or authorization, constitutes intentional infringement of Plaintiff's My Pillow Marks in violation of §43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

52. As a direct and proximate result of Defendants' illegal and infringing actions as alleged herein, Plaintiff has suffered substantial monetary loss and irreparable

1 injury, loss and damage to its business and its valuable rights in and to Plaintiff's My
 2 Pillow Marks and the goodwill associated therewith in an amount as yet unknown, but
 3 to be determined at trial, for which it has no adequate remedy at law, and unless
 4 immediately enjoined, Defendants will continue to cause such substantial and
 5 irreparable injury, loss and damage to Plaintiff and its valuable My Pillow Marks.

6 53. Based on Defendants' wrongful and infringing actions, Plaintiff is entitled
 7 to injunctive relief, as well as monetary damages and other remedies as provided by the
 8 Lanham Act, including damages that Plaintiff has sustained and will sustain as a result
 9 of Defendants' unlawful and infringing actions as alleged herein, and all gains, profits
 10 and advantages obtained by Defendants as a result thereof, enhanced discretionary
 11 damages and reasonable attorneys' fees and costs.

12 13 **SECOND CAUSE OF ACTION**

14 **(False Designation of Origin, Passing Off, & Unfair Competition)**

15 **(15 U.S.C. §1125(a) and §1117(a) against all Defendants)**

16 54. Plaintiff repeats and realleges the each and every allegation set forth in the
 17 preceding paragraphs as if fully set forth herein.

18 55. Plaintiff, as the owner of all right, title, and interest in and to the My Pillow
 19 Marks, has standing to maintain an action for false designation of origin and unfair
 20 competition under the Federal Trademark Statute, Lanham Act § 43(a) (15 U.S.C. §
 21 1125).

22 56. Defendants knowingly and intentionally used the My Pillow Marks in
 23 commerce in connection with the advertising, marketing, promotion, offering for sale,
 24 and/or sale of Defendants' pillow products. Defendants used false designations of origin
 25 and false and misleading descriptions and/or representations on or in connection with
 26 the advertising, marketing, promotion, offering for sale, and/or sale of its pillow blanket
 27 products with the intent to cause confusion, to cause mistake and to deceive the
 28 purchasing public into believing, in error, that Defendants' pillow products are

1 Plaintiff's MY PILLOW Product or a related product, that Defendants' pillow products
2 are authorized, sponsored, approved, endorsed or licensed by Plaintiff, and/or that
3 Defendants are affiliated, connected or associated with Plaintiff, thereby creating a
4 likelihood of confusion by consumers as to the source of the pillow products and
5 allowing Defendants to capitalize on the goodwill associated with, and the consumer
6 recognition of, Plaintiff's My Pillow Marks, to Defendants' substantial profit, in blatant
7 disregard of Plaintiff's rights.

8 57. By using Plaintiff's My Pillow Marks without authorization in connection
9 with the advertising, marketing, promotion, offering for sale, and/or sale of Defendants'
10 pillow products, Defendants have traded off the extensive goodwill of Plaintiff and its
11 MY PILLOW Product and did, in fact, induce, and intends to and will continue to
12 induce, customers to purchase Defendants' pillow products, thereby directly and
13 unfairly competing with Plaintiff. Such conduct has permitted, and will continue to
14 permit, Defendants to make substantial sales and profits based on the goodwill and
15 reputation of Plaintiff and its My Pillow Marks, which Plaintiff has amassed through its
16 nationwide marketing, advertising, sales and consumer recognition.

17 58. Defendants knew, or by the exercise of reasonable care, should have
18 known, that its unauthorized use in commerce of Plaintiff's My Pillow Marks would
19 cause confusion, mistake, or deception among purchasers, users and the public.

20 59. Defendants' actions described above and specifically, without limitation,
21 Defendants' use of the My Pillow Marks, and confusingly similar variations thereof, in
22 commerce to advertise, market, and sell pillow products throughout the United States
23 including California constitute unfair competition and false advertising in violation of
24 15 U.S.C. § 1125(a).

25 60. Defendant's actions have been knowing, deliberate and willful and have
26 been committed with knowledge of Plaintiff's exclusive rights and goodwill in its My
27 Pillow Marks, as well as with bad faith and the intent to cause confusion, mistake and
28 deception and trade on the goodwill and reputation of Plaintiff, its MYPILLOW brand

1 Products and its My Pillow Marks.

2 61. As a direct and proximate result of Defendants' illegal and infringing
3 actions as alleged herein, Plaintiff has suffered monetary loss and irreparable injury,
4 loss and damage to its business and its valuable rights in and to Plaintiff's My Pillow
5 Marks and the goodwill associated therewith in an amount as yet unknown, but to be
6 determined at trial, for which it has no adequate remedy at law, and unless immediately
7 enjoined, Defendants will continue to cause such substantial and irreparable injury, loss
8 and damage to Plaintiff and its valuable My Pillow Marks.

9 62. Based on Defendants' wrongful and infringing actions, Plaintiff is entitled
10 to injunctive relief, as well as monetary damages and other remedies as provided by the
11 Lanham Act, including damages that Plaintiff has sustained and will sustain as a result
12 of Defendants' unlawful and infringing actions as alleged herein, and all gains, profits
13 and advantages obtained by Defendants as a result thereof, enhanced discretionary
14 damages and reasonable attorneys' fees and costs.

15 16 **THIRD CAUSE OF ACTION**

17 **(Common Law Trademark Infringement)**

18 63. Plaintiff repeats and realleges the each and every allegation set forth in the
19 preceding paragraphs as if fully set forth herein.

20 64. Defendants have used and continue to use the My Pillow Marks to
21 promote, market, or sell pillows in the State of California.

22 65. Defendants' use of the My Pillow Marks are likely to cause confusion, to
23 cause mistake, and/or to deceive as to the source of origin or affiliation of Defendant's
24 goods.

25 66. Defendants' actions in California constitute trademark infringement and
26 unfair competition under the Common Law of California.

27 67. Plaintiff has been irreparably injured and will continue to be irreparably
28 injured unless the conduct of Defendants in California is preliminarily and permanently

1 enjoined.

2 68. Upon information and belief, Defendants undertook the adoption of the My
3 Pillow Marks willfully or with reckless intention of trading upon the good will of
4 Plaintiff.

5
6 **FOURTH CAUSE OF ACTION**

7 **(Common Law Unfair Competition)**

8 69. Plaintiff repeats and realleges the each and every allegation set forth in the
9 preceding paragraphs as if fully set forth herein.

10 70. The actions of Defendants described above and specifically, without
11 limitation, their knowledge, participation, and inducement of the unauthorized use of the
12 My Pillow Marks, and confusingly similar variations thereof, in commerce to advertise,
13 market, and sell pillow products throughout the United States and California, constitute
14 contributory trademark infringement in violation of federal law and the common law.

15 71. The actions of Defendants, if not enjoined, will continue. Plaintiff has
16 suffered and continues to suffer damages in an amount to be proven at trial consisting
17 of, among other things, diminution in the value of and goodwill associated with the MY
18 PILLOW Mark, and injury to Plaintiff's business.

19 72. On information and belief, the actions of Defendants described above were
20 and continue to be deliberate and willful.

21
22 **PRAYER FOR RELIEF**

23 WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

24 1. For entry of a preliminary and permanent injunction enjoining Defendants
25 from using any of Plaintiff's My Pillow Marks and/or a mark or URL confusingly
26 similar to any of Plaintiff's My Pillow Marks or URL;

27 2. For an award of Defendants' profits and Plaintiff's damages pursuant to 15
28 U.S.C. § 1117(a) in an amount to be proven at trial and such other compensatory

1 damages as the Court determines to be fair and appropriate pursuant to 15 U.S.C. §
2 1117(a) for trademark infringement under 15 U.S.C. §1125(a);

3 3. For an award of Defendant's profits and Plaintiff's damages pursuant to 15
4 U.S.C. § 1117(a) in an amount to be proven at trial and such other compensatory
5 damages as the Court determines to be fair and appropriate pursuant to 15 U.S.C. §
6 1117(a) for false designation of origin and unfair competition under 15 U.S.C. §1125(a);

7 4. For an award of damages to be proven at trial for common law unfair
8 competition;

9 5. For an award of exemplary or punitive damages in an amount to be
10 determined by the Court;

11 6. For Plaintiff's reasonable attorney's fees;

12 7. For all costs of suit; and

13 8. For such other and further relief as the Court may deem just and equitable.

14
15 DATED: April 3, 2018

BESHADA FARNESE LLP

16 By: s/ Peter J. Farnese
17 Peter J. Farnese

18 *Attorneys for Plaintiff,*
19 *My Pillow, Inc.*

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

DATED: April 3, 2018

BESHADA FARNESE LLP

By: s/ Peter J. Farnese
Peter J. Farnese

*Attorneys for Plaintiff,
My Pillow, Inc.*